

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

PHIL THALHEIMER; ASSOCIATED
BUILDERS & CONTRACTORS PAC
SPONSORED BY ASSOCIATED
BUILDERS & CONTRACTORS, INC.
SAN DIEGO CHAPTER; LINCOLN CLUB
OF SAN DIEGO; REPUBLICAN PARTY
OF SAN DIEGO; and JOHN NIENSTEDT,
SR.,

Plaintiffs,

vs.

CITY OF SAN DIEGO; City of San Diego
Ethics Commissioners RICHARD M.
VALDEZ, Chair, W. LEE BIDDLE,
GUILLERMO ("GIL") CABRERA, CLYDE
FULLER, DOROTHY LEONARD, and
LARRY S. WESTFALL, all sued in their
official capacity; THE HONORABLE
JERRY SANDERS, Mayor of San Diego,
sued in his official capacity; JAN
GOLDSMITH, City Attorney for the City of
San Diego, sued in his official capacity; and
ELIZABETH MALAND, City Clerk of San
Diego, sued in her official capacity,

Defendants.

CASE NO: 09-CV-2862-IEG (WMc)

**ORDER DENYING PLAINTIFFS'
EMERGENCY EX PARTE MOTION
TO VACATE STAY OF ORDER
ENJOINING CONTRIBUTIONS BY
POLITICAL PARTIES TO THEIR
CANDIDATES**

[Doc. No. 70.]

1 Presently before the Court is Plaintiffs' emergency ex parte motion to vacate the stay of the
 2 Court's February 16, 2010 Order (the "Order") granting preliminary injunction as to the limit on
 3 campaign contributions from political parties to candidates. (Doc. No. 70.)

4 The City has filed a response. Based on the parties' briefs and oral argument, and for the
 5 reasons stated herein, the Court DENIES Plaintiffs' motion.

6 **BACKGROUND**

7 Plaintiffs Phil Thalheimer, Associated Builders & Contractors, Inc. San Diego Chapter, Lincoln
 8 Club of San Diego County, San Diego County Republican Party, and John Nienstedt ("Plaintiffs")
 9 challenge the constitutionality of San Diego's campaign finance laws on First Amendment grounds.
 10 Plaintiffs' Verified Complaint names as defendants the City of San Diego ("the City") and several
 11 government officials in their official capacity.¹ (Doc. No. 1.)

12 On December 21, 2009, Plaintiffs filed a motion for preliminary injunction asking the Court to
 13 enjoin the City from enforcing five sections of the San Diego Municipal Election Campaign Control
 14 Ordinance ("ECCO"). (Doc. No. 3.) On February 16, 2010, the Court issued an Order granting in part
 15 and denying in part Plaintiff's motion.² (Doc. No. 43.)

16 Relevant to this motion, the Court enjoined enforcement of Section 27.2950 to the extent it
 17 prohibits candidates from soliciting and accepting contributions from political parties. Section
 18 27.2950(a) provides: "It is unlawful for a candidate or controlled committee, or any treasurer thereof,
 19 or any other person acting on behalf of any candidate or controlled committee, to solicit or accept a
 20 contribution from any person other than an individual for the purpose of supporting or opposing a
 21 candidate for elective City office." ECCO § 27.2950(a). The Court found Plaintiffs had demonstrated
 22 they are likely to prevail on their argument that a complete prohibition on political party contributions
 23 is not "closely drawn" to the City's interest in preventing corruption and the appearance of corruption.
 24

25 ¹ On January 8, 2010, the Court granted the parties' joint motion to dismiss all defendants
 26 except the City of San Diego. Pursuant to the joint motion, these defendants are bound by the Court's
 27 rulings with respect to the matters at issue.

28 ² The parties have filed cross-appeals with the Ninth Circuit Court of Appeal regarding the
 February 16, 2010 Order.

(Order, at 20.) However, the Court stayed the injunction “until further order of the Court, so as to allow the City time to provide an alternative limit on the contributions.” (Order, at 26.)

On April 27, 2010, the Court heard oral argument on the instant motion to lift the stay. Coincidentally, on the same day, the City Council held an open session meeting to consider a new contribution limit. (Bradley Decl. ¶ 7.) After oral argument, the City filed a supplemental document regarding the City Council’s unanimous vote to introduce an ordinance limiting political party contributions to \$1,000. (Doc. No. 74.) According to the City, if passed by the City Council and approved by the Mayor, the new limit would become effective by late June 2010.

DISCUSSION

Plaintiffs move the Court to immediately lift the stay of its preliminary injunction relating to contributions from political parties to candidates, arguing that the City has had ample time to enact a new limit.

Plaintiffs contend they will suffer irreparable harm if Plaintiff San Diego County Republican Party (the “Party”) cannot make contributions to support its candidates before the June 8, 2010 City Council primary election. If a candidate obtains more than 50% of the vote in the primary, that candidate wins the seat. If no candidate exceeds 50%, the top two vote-getters proceed to the November General Election in their district. Because there may be no General Election for certain seats, and even if there is a General Election, the Party’s endorsed candidates may not qualify for it, Plaintiffs explain that if the Party is not allowed to contribute now, it may lose its opportunity for meaningful association with its candidates. The Party wishes to make direct contributions, in-kind contributions, and coordinated expenditures. Among other contributions, the Party wishes to contribute \$20,000 to the Lorie Zapf campaign to keep the race competitive, as the frontrunner currently has \$46,450.46 cash on hand, while Zapf has \$19,222.³ (Boling Decl. ¶¶ 9, 11.)

Plaintiffs further contend that the period from April 30, 2010 to May 14, 2010 is crucial for communicating with voters. Sample ballots are mailed out beginning April 30, 2010, and absentee

³ In addition, the Party would contribute \$5,000 to the Adrian Vazquez campaign. (Boling Decl. ¶ 12.) The Party would also make various coordinated expenditures with endorsed candidates, including paying representatives to visit voters, and in-kind contributions, including contributing office space, supplies, and equipment and paying for advertisements. (Boling Decl. ¶¶ 13-22.)

1 ballots are mailed out on May 10, 2010. According to Plaintiffs, over half the ballots cast in the
 2 election will likely be absentee ballots, and historically, one-third of all absentee ballots are cast within
 3 the first 72 hours after the voter receives the ballot. (Declaration of C. April Boling in Supp. of Pls.’
 4 Mot. (“Boling Decl.”) ¶¶ 3-4.)

5 As indicated in its preliminary injunction Order, the Court is mindful of the likely harm to
 6 Plaintiffs’ associational rights by a complete ban on contributions from political parties to candidates.
 7 However, the Court’s Order allowed the City time to provide a new contribution limit. (Order, at 26.)
 8 Upon consideration of the parties’ arguments, the balance of hardships weighs in favor of the City.
 9 Importantly, if the Court were to grant Plaintiffs’ motion and lift the stay before the City’s new limit is
 10 passed and becomes effective, there would be no limit on contributions from parties to candidates.
 11 During that interim period before a new limit becomes effective, parties would be able to infuse
 12 limitless amounts of money into the election. It is noteworthy that Plaintiffs want to contribute an
 13 amount 40-times larger than the \$500 limit on contributions from individuals, as well as make
 14 significant coordinated expenditures and in-kind contributions. In addition, as the City argues, lifting
 15 the stay would be unfair to candidates currently leading in campaign funds, who raised funds by
 16 following the campaign finance laws as presently written.

17 The City represents that it is set to pass an ordinance amending the ECCO and establishing a
 18 new limit in the near future.⁴ On April 27, 2010, the City Council voted unanimously to introduce an
 19 ordinance limiting political party contributions to \$1,000. (Doc. No. 74.) The San Diego City Charter
 20 (“City Charter”) requires that at least 12 calendar days must elapse after the City Council introduces
 21 the ordinance before it can be passed. (Bradley Decl. ¶ 8.) Thereafter, the Mayor has 10 business days

22
 23 ⁴ The City’s declarations show that it has been diligent in working to enact a new limit. Shortly
 24 after the Court issued its February 16, 2010 Order, the City Attorney’s Office began conducting legal
 25 research and considering proposed amendments. (Declaration of Catherine Bradley in Supp. of Def.’s
 26 Opp’n (“Bradley Decl.”) ¶ 3.) On March 11, the Ethics Commission made a recommendation to the
 27 City Council as to an appropriate limit. (Bradley Decl. ¶ 4.) On March 19, the Commission staff
 28 provided draft amendments to ECCO that incorporated the recommendation. (Bradley Decl. ¶ 4.) On
 or about March 31, Catherine Bradley of the City Attorney’s Office completed the ordinance with
 proposed amendments. (Bradley Decl. ¶ 5.) On April 6, 2010, the City Attorney’s Office submitted
 the final version of the proposed amendments to the ECCO to the Office of the City Clerk for the
 matter to docketed for a City Council meeting. (Bradley Decl. ¶¶ 5-6.) On April 27, 2010, the City
 Council held open session to consider the new contribution limit. (Bradley Decl. ¶ 7.)

1 to approve or veto the ordinance, and another 30 days must pass (the referendum period) before the
 2 ordinance takes effect. (Declaration of Dick A. Semerdjian in Supp. of Def.'s Opp'n, Ex. 3.)
 3 Therefore, the new \$1,000 limit, if passed and approved, would go into effect by late June.

4 The Court will abide by the time frame set forth in the City Charter. Plaintiffs argue that the
 5 process can be expedited pursuant to City Charter Sections 275(c) and 295, which permit the City
 6 Council to pass an ordinance "calling or relating to elections" the day the ordinance is introduced in
 7 the City Council, and make it effective the date of passage.⁵ (Declaration of Joseph La Rue in Supp.
 8 of Pls.'s Mot. ¶¶ 2-4.) However, the Court believes these sections are not applicable. As the City
 9 argues, this ordinance relates to campaign financing, not elections. In addition, the City asserts that it
 10 is unaware of any ordinances relating to campaign financing being passed on the date of introduction
 11 pursuant to these sections. (Bradley Decl. ¶ 9.)

12 While it is possible, as Plaintiffs argue, that the City did not initially start the process of
 13 enacting a new limit with all due speed, the Court relies on the City's representations that the City
 14 Council has now introduced a new limit, starting the time period for the new limit to become effective,
 15 and that this limit is likely to be accepted without veto.

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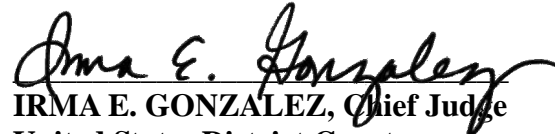
25 ⁵ Section 275(c) provides that "ordinances calling or relating to elections" may be "passed by
 26 the Council on the day of their introduction," while other ordinances "shall be passed by the Council
 27 only after twelve calendar days have elapsed from the day of their introduction." Section 295(d)
 28 provides that "ordinances calling or relating to elections . . . shall take effect at the time indicated
 therein. All other ordinances passed by the Council shall take effect at the time indicated therein, but
 not less than thirty calendar days from the date of their final passage."

CONCLUSION

Because the balance of hardships weighs in favor of the City, the Court DENIES Plaintiff's emergency ex parte motion to vacate the stay of the Court's Order granting preliminary injunction as to the limit on contributions from political parties to candidates.

IT IS SO ORDERED.

DATED: April 28, 2010.


IRMA E. GONZALEZ, Chief Judge
United States District Court